RECORD AND BRIEFS

No. 16-299

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY BRIEF OF RESPONDENTS WATERKEEPER ALLIANCE, INC., CENTER FOR BIOLOGICAL DIVERSITY, CENTER FOR FOOD SAFETY, HUMBOLDT BAYKEEPER, RUSSIAN RIVERKEEPER, MONTEREY COASTKEEPER, SNAKE RIVER WATERKEEPER, INC., UPPER MISSOURI WATERKEEPER, INC., TURTLE ISLAND RESTORATION NETWORK, INC., SIERRA CLUB, AND PUGET SOUNDKEEPER ALLIANCE IN SUPPORT OF PETITIONER

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ARGUMENT

Section 1369(b)(1)(E) of the Clean Water Act ("CWA" or the "Act") applies to actions taken by the Administrator of the U.S. Environmental Protection Agency ("EPA") in "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title." 33 U.S.C. § 1369(b)(1)(E). In this case, EPA and the U.S. Army Corps of Engineers (collectively, the "Agencies") argue that the Clean Water Rule qualifies as an "other limitation" under Section 1311 of the Clean Water Act. This argument fails for two reasons. First, the Clean Water Rule does not properly qualify as an "other limitation" within the meaning of Section 1369(b)(1)(E) because it merely interprets the Congressional definition of those waters to which existing limits apply; it does not create a new one. And second, the Agencies did not promulgate the Clean Water Rule pursuant to Section 1311 or any of the other sections listed in Section 1369(b)(1)(E).

A. The Clean Water Rule Is Not An "Other Limitation" Within The Meaning Of Section 1369(b)(1)(E)

On its face, Section 1369(b)(1)(E) applies only to "effluent limitation[s]" and "other limitation[s]" approved or promulgated pursuant to the four specified statutory sections, 33 U.S.C. §§ 1311, 1312, 1316, and 1345. The Agencies urge this Court to deem the Clean Water Rule an "other limitation"

promulgated pursuant to Section 1311. The Court should reject this invitation.

While Congress did not define the term "other limitation" as used in Section 1369(b)(1)(E), it is best understood by virtue of its relationship to both the immediately preceding phrase, "effluent limitation," and the four specified statutory sections listed in Section 1369(b)(1)(E).

Section 1369(b)(1)(E) clearly juxtaposes the terms "effluent limitation[s]" and "other limitation[s]" approved or promulgated under the relevant provisions. As Justice Ginsburg recently noted in *Yates v. United States*, "we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." ___ U.S. ___, 135 S.Ct. 1074, 1085 (2015) (plurality opinion) (internal quote and citation omitted). In the present context, this Court should look to the characteristics of "effluent limitation[s]" under the Statute, and how they are implemented, to understand what Congress must have meant by the counterpart phrase, "other limitation."

Congress defined the phrase "effluent limitation" in the following terms:

> The term "effluent limitation" means any restriction established by a State or the Administrator on quantities,

> rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11). In practice, EPA typically sets these limitations, often pursuant to an express grant of statutory power. Indeed, the statutory sections referenced in Section 1369(b)(1)(E)—Sections 1311, 1312, 1316 and 1345—speak frequently and explicitly about the approval or promulgation of standards meeting the above definition.[1]

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[1] *See, e.g.*, 33 U.S.C. §§ 1311(c), (d), (g), (h), (i), (k), (m), (n), and (p) (allowing EPA, with the concurrence of the states in some instances, to update or approve modifications—in specified contexts—to either the substance or the timing of the relevant requirements), 1312(a) (authorizing EPA to establish water-quality-related permit conditions), 1316(b)(1)(B) (authorizing EPA to promulgate new source performance standards), and 1345(b) (authorizing EPA to promulgate sewage sludge regulations where the handling of such sludge by a treatment plant may impact the navigable waters). The sole exception to this dynamic is in Section 1311(b), which, as this Court noted in *E.I. du Pont de Nemours & Co. v. Train*, is oddly silent about "who sets the § [1311] effluent limitations." 430 U.S. 112, 121 (1977) ("*E.I. du*

More significantly, and as the Agencies acknowledge, effluent limitations generally take effect for individual dischargers only when they are incorporated into permits issued under the national pollutant discharge elimination system ("NPDES"); in this context, the permit issuer—which may be either EPA or a state, *see* 33 U.S.C. § 1342(a)(1) and (b)(1)—in effect "translates" the national standards into facility-specific requirements. Federal Respondents' Brief at 23 (citing *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 928 (5th Cir. 1998) and *Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 344 (5th Cir. 1981)). Once the effluent limitations are incorporated into the relevant permits, the resulting permit conditions become enforceable under the Act. *See, e.g.*, 33 U.S.C. §§ 1319(a), (b), and (d) (EPA enforcement) and 1365(a)(1) and (f) (citizen suits).[2]

Turning to the realm of "other limitation[s]," three of the statutory sections referenced in Section 1369(b)(1)(E)—Sections 1311, 1316, and 1345—authorize EPA to establish substantive

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Pont"). Nonetheless, the *E.I. du Pont* Court found that EPA had correctly interpreted Section 1311(b) as giving it the power to set those standards through rulemaking. *Id.* at 135–136.

[2] Although these provisions also reference other statutory sections, including Sections 1311, 1312, 1316, and 1345, for permitted entities in most cases it is the permit condition that must be enforced, not

requirements, some of which cannot constitute "effluent limitation[s]" because they do not address "discharge[s] from point sources into navigable waters," as required under Section 1362(11). In the first two of these contexts, this power emerges from the interplay between these sections and Section 1326 of the Act. In that section—dealing with thermal discharges—Congress gave EPA the power to establish what are colloquially referred to as "intake structure" regulations, governing water withdrawals by power plants. 33 U.S.C. § 1326(b). As the Fourth Circuit recognized in *Virginia Elec. & Power Co. v. Costle*, 556 F.2d 446 (4th Cir. 1977), however, Section 1326(b) itself makes clear that the regulations were to be promulgated under Sections 1311 or Section 1316 (for existing or new sources, respectively). *Id.* at 450, citing 33 U.S.C. § 1326(b) ("any standard established pursuant to section [1311] or [1316] ... shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact"). Thus, the court correctly determined that the standards constituted "other limitation[s]" within the meaning of Section 1369(b)(1)(E). *Id.*

In similar fashion, Section 1345(d) of the Act charged EPA with establishing standards for the disposal of sewage sludge generated by sewage treatment plants. 33 U.S.C. § 1345(d). These regulations cover, *inter alia*, the land application of such sludge (e.g., as fertilizer), the disposal of sludge at surface sites, and the incineration of sludge in sewage sludge incinerators. 40 C.F.R.

Part 503 (subparts B, C, and E, respectively). Here also, at least some of the regulations cannot constitute "effluent limitation[s]," because they address threats to soils and air, not the navigable waters.[3] Thus, these regulations are best viewed as "other limitation[s]" within the meaning of Section 1369(b)(1)(E).

In both of the above contexts—dealing with intake structures and sewage sludge—the requirements are implemented through permit conditions. *See* 40 C.F.R. § 125.90(a) (intake structures) and 33 U.S.C. § 1345(f) (sewage sludge).[4]

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[3] *See, e.g.*, 40 C.F.R. § 503.43 (imposing limitations and other requirements under authority of Section 1345 for the incineration of sewage sludge intended to control air pollutant emissions); *see also* 58 Fed. Reg. 9248, 9249 (Feb. 19, 1993) (Preamble to EPA's initial Part 503 regulations, promulgated under authority of Section 1345, noting that "[c]oncern for air quality necessitates proper controls over sludge incineration").

[4] In the sewage sludge context, the permit does not necessarily need to be an NPDES permit. *See* 33 U.S.C. § 1345(f). As EPA has noted, however, it usually is. EPA, A Plain English Guide to the EPA Part 503 Biosolids Rule (September 1994) at 11 ("In most cases, Part 503 requirements will be incorporated over time into [NPDES] permits issued to [the relevant entities]."), *available at* https://www.epa.gov/sites/production/ files/2015-05/documents/a_plain_english_guide_to_the_epa_p

In line with the above, the phrase "other limitation," as used in Section 1369(b)(1)(E), is best understood in context. In the four statutory provisions referenced in that Section, Congress charged EPA with establishing various requirements, which were then to be made applicable to individual dischargers through permit conditions. As befits the NPDES program's primary focus on discharges of pollutants, *see* 33 U.S.C. §1342(a), most of these requirements qualify as "effluent limitation[s]" within the meaning of Section 1362(11). The others—those not governing discharges—constitute the relevant "other limitation[s]."

The Agencies, by contrast, urge a practically unlimited interpretation of the "other limitation" phrase, at least insofar as it deals with a subject relating to Section 1311 in any way. Federal Respondents' Brief, pp. 17–18. In particular, they argue that "[a] rule that specifies which sites are 'waters of the United States' imposes on persons who discharge pollutants to those waters the full panoply of effluent and other limitations under Section 1311." *Id.* This position is untenable. As Judge Griffin noted below, it is the Act itself—not the Clean Water Rule—that "restricts the industry's untrammeled discretion." *In re United States Dept. of Defense and United States Environmental Protection Agency Final Rule: Clean*

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art_503_biosolids_rule.pdf (last checked September 8, 2017).

Water Rule: Definition of "Waters of the United States", 817 F.3d 261, 279-280 (6th Cir. 2016) (*In re Dept. of Defense*") (Griffin, J., concurring in judgment). Specifically, Section 1311(a), when taken together with the definitions in Section 1362, prohibits persons from discharging pollutants into the "waters of the United States," except to the extent that they comply with specified requirements, including—in appropriate cases—the requirements of the NPDES permit program. 33 U.S.C. 1311(a) (referencing 33 U.S.C. §1342). This prohibition is in no way dependent upon the Clean Water Rule, which does not "limit" anything. The Agencies conceded as much in the preamble to the Rule:

> The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments.

Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,102 (June 29, 2015).

Instead of establishing limitations, the Clean Water Rule merely clarifies the waters to which the statutory prohibition in Section 1311(a) applies. The Agencies' comments in the preamble also confirm this point:

> This rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States ..." consistent with Supreme Court precedent.

Id. (citation omitted).

The conclusion that the Clean Water Rule does not constitute an "other limitation" is further underscored by the fact that nothing in the statute even contemplates that the Agencies would write rules further elaborating on the scope of the statutory waters, or on any of the other jurisdictional elements of Section 1311(a), let alone requires them to do so. Nothing would have constrained the Agencies from proceeding from the outset without regulations defining the "waters of the United States." In following such a course, the Agencies could have gradually established at least some clarification through litigation. While attempting to write clarifying regulations on an up-front basis may be a salutary undertaking, clarifying the scope of a limitation simply is not the same thing as establishing a limitation. Congress, not the Agencies, created the limitation in Section 1311(a)(1).

B. The Agencies Did Not Promulgate The Clean Water Rule Pursuant To Section 1311 Or Any Of The Other Relevant Sections Listed In Section 1369(b)(1)(E)

Even if the Court determines that the Clean Water Rule establishes limitations capable of qualifying as "other limitation[s]" under Section 1369(b)(1)(E), it still would not trigger the applicability of that Section. This is so because Section 1369(b)(1)(E) also requires—as a precondition to its applicability—that EPA approve or promulgate the rule pursuant to one of four statutory sections, 33 U.S.C. §§ 1311, 1312, 1316, or 1345. In the preamble to the Clean Water Rule, the Agencies cited five separate sections as providing the legal basis for their authority, including, most notably, Sections 1311 and 1361. Of the five, Section 1311 is the only one that appears on the list of qualifying authorities in Section 1369(b)(1)(E). 80 Fed. Reg. at 37,055.[5] Perhaps for this reason, the Agencies rely entirely on Section 1311 in their brief. Federal Respondents' Brief, pp. 17–30.[6] Section 1311 does not provide an adequate statutory basis for the Clean Water Rule. EPA's

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[5] The others were Sections 1341, 1342, and 1344. 80 Fed. Reg. at 37,055.

[6] The Agencies reference Section 1361 once as support for the Rule, in a footnote in the introduction to their argument. Federal Respondents' Brief at 17, n.3. It never comes up again.

proper basis for promulgating a rule further defining the Act's jurisdictional terms resides in Section 1361(a), which is not within the scope of Section 1369(b)(1)(E).

Section 1361(a) provides EPA with the general authority to "prescribe such regulations as are necessary to carry out [its] functions under [the Act]." 33 U.S.C. § 1361(a). As alluded to above, *see* footnote 1 and accompanying text, several sections of the Clean Water Act provide EPA with the authority to promulgate regulations that are geared to specific programs. *See also, e.g.*, 33 U.S.C. §§ 1317(b) (requiring EPA to promulgate "pretreatment standards" for those who discharge effluent into publicly owned treatment works) and 1322(b) (requiring EPA to "promulgate Federal standards of performance for marine sanitation devices").

Putting aside any issues regarding the merits of the Rule, the proper legal authority for the Clean Water Rule is found only in Section 1361(a). This is so for at least two compelling reasons. First, no other provision of the Act provides any explicit basis for the promulgation of regulations interpreting the definitional components of Section 1362 (including the definition of "navigable waters" in Section 1362(7), which is where the "waters of he United States" language appears). In other situations, of course, a court might infer that an agency has the implied authority to resolve any definitional ambiguities. But here there is no need.

Section 1361(a) explicitly provides a breadth of authority that readily encompasses such a rule.

Second, the terms that are being defined here—"waters of the United States" and thus, in turn, "navigable waters"—apply across the entire statute. The Agencies themselves recognized this in the preamble to the Clean Water Rule:

> The jurisdictional scope of the [CWA] is "navigable waters," defined in section [1362(7)] of the statute as "waters of the United States, including the territorial seas." The term "navigable waters" is used in a number of provisions of the [CWA], including the section [1342] National Pollutant Discharge Elimination System (NPDES) permit program, the section [1344] permit program, the section [1321] oil spill prevention and response program, the water quality standards and total maximum daily load programs (TMDL) under section [1313], and the section [1341] state water quality certification process.

80 Fed. Reg. at 37,055 (footnote omitted). It is self-evident that a provision giving EPA statute-wide rulemaking authority is the proper place to ground the authority for the most over-arching regulation promulgated under the statute.

Section 1311 simply will not bear the weight the Agencies place upon it. While it contains several provisions authorizing EPA to create, update, or modify effluent limitations, *see, e.g.*, Section 1311(c), (d), and (g), that section simply contains no indication that it provides EPA with any authority to interpret the Act's jurisdictional definitions. The Agencies point to the basic prohibition in Section 1311(a), but nothing in that provision is even suggestive regarding the creation of any general rulemaking authority. Moreover, as Judge Griffin noted below, "the definitional section the Clean Water Rule modifies—'the term 'navigable waters' means the waters of the United States'"—does not emanate from Section 1311(a). *In re Dept. of Defense*, 817 F.3d at 277 (Griffin, J., concurring). Instead, as Judge Griffin further noted, it finds its origin in Section 1362, which is not mentioned in Section 1369(b)(1)(E).

This Court should deem the Clean Water Rule to have been promulgated under Section 1361(a) of the Clean Water Act, thus making it ineligible for expedited review under Section 1369(b)(1)(E).

CONCLUSION

For the foregoing reasons and for the reasons stated in Respondents' opening brief, the judgment of the court of appeals should be reversed.

Dated: September, 2017.

Respectfully submitted,

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